

Office of Chief Counsel  
Internal Revenue Service  
**Memorandum**

Release Number: 20152301F

Release Date: 6/5/2015

CC:LB&I:RFPH:MAGilbert  
POSTF-114514-14

UILC: 6212.07-00, 6501.08-00, 6501.08-04, 6501.08-12, 6501.08-19, 1502.77-01

date: August 11, 2014

to:  
Internal Revenue Agent,

from: Marjory A. Gilbert, Senior Counsel  
(Large Business & International)

---

subject: Service Reliance on a Consent Executed Pursuant to a Defective Power of Attorney  
and on a Protectively Obtained Transferee Consent

This memorandum responds to your request for assistance. This advice may not be  
used or cited as precedent.

Legend

Corporation A	=
Corporation B	=
Corporation C	=
Officer One	=
Officer Two	=
Officer Three	=
Officer Four	=
Officer Five	=
Officer Six	=
Officer Seven	=
Agreement A	=

Agreement B =

Former Shareholders of =  
Corporation B and Its  
Predecessor Corporation  
Tax Liability of =  
Corporation A  
Firm One =

Representative One =

Representative Two =  
Representative Three =  
POA X =  
POA Y =  
POA Z =  
Consent One =  
Consent Two =  
Consent Three =  
Revenue Agent =  
Document One =

Document Two =

Document Three =

Amount 1 =  
Amount 2 =  
Amount 3 =  
Amount 4 =  
Amount 5 =  
Amount 6 =  
Amount 7 =  
Amount 8 =  
Amount 9 =  
Amount 10 =  
Address Z =

State A =  
State B =

Section 1	=
Section 2	=
Year 1	=
Year 2	=
Year 3	=
Year 4	=
Year 5	=
Year 6	=
Year 7	=
Year 8	=
Year 9	=
Year 10	=
Month A	=
Month B	=
Month C	=
Month D	=
Month E	=
Date A	=
Date B	=
Date C	=
Date D	=
Date E	=
Date F	=
Date G	=
Date H	=
Date J	=
Date K	=
Date L	=
Date M	=
Date N	=
Date P	=
Date Q	=
Date R	=
Date S	=
Date T	=
Date V	=
Date W	=
Date X	=
Date Y	=
Date Z	=
Date AA	=
Date AB	=
Date AC	=
Date AD	=

Date AE	=
Date AF	=
Date AG	=
Date AH	=
Date AJ	=
Date AK	=
Date AL	=
Date AM	=
Date AN	=
Date AP	=
Date AQ	=
Date AR	=
Date AS	=
	=
	=

### ISSUES

1. Whether the Internal Revenue Service ("Service") may rely upon a consent to extend the statute of limitations when a representative signed the consent pursuant to a power of attorney form signed by an individual as president of Taxpayer after Taxpayer merged into its subsidiary.

2.

### CONCLUSIONS

Given the facts and circumstances, including the fact that the  
 , the Service can rely upon the power of attorney form based on the Illinois statute that allows  
 and common law agency. Therefore, the Service can also rely upon the consent signed pursuant to the power of attorney form, applying the principles of reformation.

2. Taxpayer's successor is a transferee in addition to being the successor of Taxpayer, and the consent to extend the transferee statute of limitations signed by the successor in a transferee capacity is valid. [REDACTED]

POSTF-114514-14

5

FACTS





















### LAW AND ANALYSIS

The statute of limitations for assessing an income tax liability generally expires three years after the date the return is filed. I.R.C. § 6501(a); Mecom v. Commissioner, 101 T.C. 374, 381 (Year 2), *aff'd without published opinion*, 40 F. 3d 385 (5th Cir. 1994).

One exception to the general rule that the tax must be assessed within three years states:

Where before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title ... both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon.

I.R.C. § 6501(c)(4)(A).

While the regulations under § 6501 reiterate that the taxpayer must consent in writing to extend the statute of limitations (Treas. Reg. § 301.6501(c)-1(d)), the regulations do not address whether a taxpayer can empower a representative to sign a consent on behalf of the taxpayer. However, I.R.C. § 6061(a) provides that documents "required to be made under any provision of the internal revenue laws or regulations **shall be signed in accordance with forms** or regulations prescribed by the Secretary." (emphasis added). The Form 2848, Power of Attorney and Declaration of Representatives page 1, item 5, states that, unless otherwise provided on the Form 2848, an appointed representative can sign consents.

When the taxpayer is a corporation, the question of who can sign a Form 2848 for a corporation is addressed in the separate instructions for the Form 2848

Said instructions state the Form 2848 must be signed by "[a]n officer having authority to bind the taxpayer". While neither the code nor the regulations specifically define who has authority to bind a corporation, Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified by Rev. Rul. 84-165, 1984-2 C.B. 305, states that the Service will generally apply the rules governing the signing of original returns to determine who has authority to sign extensions of the period for assessment. By analogy, since we are here concerned with a Form 2848 that was relied upon as authority to sign a consent, the rulings would also apply to determine who has authority to sign the Form 2848 for a corporate taxpayer.

For corporate taxpayers the rules governing the signing of original returns are in I.R.C. § 6062, which provides authority for a corporation's "president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized so to act" to sign a tax return. For consolidated groups (with exceptions not here relevant based on the provided facts)

**the common parent . . . . for a consolidated return year is the sole agent** (agent for the group) that is authorized to act in its own name with respect to all matters relating to the tax liability for that consolidated return year, for –

- (A) Each member in the group; and
- (B) Any successor

Treas. Reg. § 1.1502-77(a)(1)(emphasis added).

When a consolidated group ceases to exist, the regulations provide:

If the common parent fails to designate a substitute agent for the group before its existence terminates and **if the common parent has a single successor that is a domestic corporation, such successor becomes the substitute agent** for the group upon termination of the common parent's existence.

Treas. Reg. § 1.1502-77(d)(2).<sup>1</sup>

---

<sup>1</sup> Based on the provided facts, we assume



The term "successor" as used in Reg. § 1.1502-77(a)(1) is defined as

an individual or entity (including a disregarded entity) that is primarily liable, pursuant to applicable law (including, for example, by operation of a state or Federal merger statute), for the tax liability of a member of the group.

Treas. Reg. § 1.1502-77(a)(2)(iii).

The information provided to the Service confirms that

As concluded in § 1. B. Illinois and State B law Re:  
Merged Corporations, below, Corporation B meets the definition of successor.  
Accordingly, since

, Corporation B is the substitute agent that should sign the Form 2848.<sup>2</sup> The fact that there was

, does not alter Corporation B's status as successor. Since

. Corporation B continues as Corporation A's successor, and Corporation B, not Corporation C, is the proper party to sign.

Hence, Corporation B should have signed the Form 2848 – just as its predecessor (Corporation A) would have had to sign the consent to extend the statute of limitations for the Year 3 year if the predecessor had not merged into Corporation B. See Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839, 853 (1985) ("It has been held that taxes are debts or liabilities. It follows that [an acquiring corporation], who became primarily liable for the tax liabilities of [a target corporation] after the merger under [State] law, had the power under State law to extend the period of limitation for its own direct liability, just as its predecessor, [target], would have had.") (citations omitted).

---

<sup>2</sup> If Corporation A had other subsidiaries, the group would have continued in existence with Corporation B as the new common parent of the group and Corporation B would sign the form as such. However, if at least 80% of the vote and value of the stock of Corporation B had since been acquired by another corporation (or if Corporation B has been liquidated into such corporation), then it would no longer be the common parent of the group and the group likely would have terminated.

Previously,

Treas. Reg. § 1.6062-1(c) provides that “[a]n individual's signature on a return, statement, or other document made by or for a corporation shall be prima facie evidence that such individual is authorized to sign such return, statement, or other document.” Thus,

## **1. State Law**

Once a corporation ceases to exist, the result “can not be distinguished from the death of a natural person in its effect.” Oklahoma Natural Gas Co. v. Oklahoma, 273 U.S. 257, 259 (1927).<sup>3</sup> As a result, a corporation that no longer exists is, in effect, legally

---

<sup>3</sup> The corporation in Oklahoma Gas Company ceased to exist by reason of dissolution, not merger.

dead. However, unlike when a natural person is dead, since a state has control over the creation and termination of a corporation's existence, a state can enact statutes that provide a corporate entity that ceased to exist continues to survive as stated in the statute. See Oklahoma Natural Gas Co., 273 U.S. at 259-60 ("[C]orporations exist for specific purposes, and only by legislative act, so that **if the life of the corporation is to continue . . . it is necessary that there should be some statutory authority for the prolongation.** The matter is really not procedural . . . . It concerns the fundamental law of the corporation enacted by the State which brought the corporation into being.") (emphasis added).

#### A. Illinois Law Re: Dissolved Corporations

Illinois law provides that a corporation whose existence terminates by dissolution may continue to perform such "acts as are necessary to wind up and liquidate its business and affairs." Illinois Business Corporation Act of 1983, 805 ILL COMP. STAT. 5/12.30(a)(5) (2014).<sup>4</sup> Dissolution powers are not applicable, however, if a corporation ceases to exist via a merger rather than dissolution. See Lawrence v. Williams Ford, Inc., 13 Ill. App. 3d 880, 887, 300 N.E. 2d 636 (Ill. App. Ct., 2nd Dist. 1973) (repudiating a Federal district court case that erroneously applied Illinois law relative to dissolutions to a merger transaction).

this memorandum does not address whether, under Illinois dissolution law,

#### B. Illinois and State B Law Re: Merged Corporations

The Illinois Business Corporation Act of 1983 allows a parent corporation to merge into a subsidiary corporation (805 ILL COMP. STAT. 5/11.30 (2014)) and allows mergers of Illinois corporations with other states' corporations (805 ILL COMP. STAT. 5/11.37 (2014)).

Illinois law specifically addresses the effect of a merger as follows:

(1) The several corporations parties to the plan of merger or consolidation shall be a single corporation, which, in the case of a merger, is that corporation designated in the plan of merger as the surviving corporation . . .

(2) The separate existence of all corporations parties to the plan of

<sup>4</sup> Effective July 1, 1984, amended by Illinois P.A. 85-1344, § 4 eff. Aug. 31, 1988, formerly cited as Ill. Rev. Stat. Ch. 32, ¶ 12.30.

<sup>5</sup> See Joseph Bassano, Laura Hunter Dietz, Alan J. Jacobs, Michele Meyer McCarthy and Thomas Muskus, Effect of Dissolution; Winding Up Corporate Affairs, § XV.B, 13 Illinois Law and Practice, Corporations § 359 (May 2014) (summarizing power to act after dissolution).

merger . . . , except the surviving . . . corporation, shall cease.

\* \* \*

(4) Such surviving or new corporation shall thereupon and thereafter possess all the rights, privileges, immunities, and franchises, as of a public or a private nature, of each of the merging or consolidating corporations; and all property, real, personal, and mixed, and all debts due on whatever account, including subscriptions to shares, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate, or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation.

(5) Such surviving . . . corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated; and any claim existing or action or proceeding pending by or against any of such corporations may be prosecuted to judgment as if such merger or consolidation had not taken place, or such surviving or new corporation may be substituted in its place. **Neither the rights of creditors nor any liens upon the property of any such corporations shall be impaired by such merger or consolidation.**

805 ILL COMP. STAT. 5/11.50(a)(1), (2), (4) and (5) (2014) (emphasis added).

See Knoll Pharmaceutical Co. v. Automobile Insurance Co. of Hartford, 152 F. Supp. 2d 1026, 1039 (N.D. IL 2001) ("In Illinois, a corporation which merges with another corporation assumes the obligations and liabilities of the latter corporation.") (citation omitted).

The relevant State B provisions appear in \_\_\_\_\_ the State B Code.  
 Section \_\_\_\_\_ provides that, *inter alia*, "**all debts, liabilities and duties**  
**attach to said surviving**  
**corporation, and may be enforced against it**  
 \_\_\_\_\_ it." State B §  
 (emphasis added).<sup>6</sup> Section \_\_\_\_\_ provides, *inter alia*, that "**[a]ny action or**

<sup>6</sup> State B \_\_\_\_\_, §

proceeding,

shall be prosecuted as if  
such merger or consolidation had not taken place,

." State B § (emphasis added).<sup>7</sup>

For example, it states that "

" Agreement A,

Under Illinois and State B law, the result is the same; Corporation B is the successor as defined in Treas. Reg. § 1.1502-77(a)(1), i.e., primarily liable. See Coulter Corp. v. Leinert, 869 F. Supp. 732, 3734 (E.D. Mo. 1994) ("[t]he court need not address which body of law actually applies to this issue because the result would be the same under the laws of Delaware ... , Illinois ... and Florida ...: the rights and liabilities of merging corporations are retained by the surviving corporation.") (citations omitted). Accordingly, Corporation B is the successor to Corporation A.

---

<sup>7</sup> State B

§

For purpose of post-merger actions of a merged corporation, Illinois law continues the corporate life for **"any claim existing"**. State B law limits the continued life of a merged corporation to pre-existent **actions or proceedings**. See 805 ILL COMP. STAT.

5/11.50(a)(5) vis-à-vis State B § (both statutes are quoted above, with double emphasis added for the key phrases). This difference in statutory law is critical to the question of whether post merger Corporation A continued to exist so that POA Y could be captioned in the name of, and executed on behalf of, Corporation A.

It has already been established that the phrase "claim existing" encompasses potential tax deficiencies prior to the issuance of a notice of deficiency.

**[T]he tax years involved had ended over a year prior to the merger, and until the statute of limitations ran on assessment and collection, potential tax liability existed.** Although it is true that no final determination of a deficiency had been made prior to the merger, nor had a 30-day letter been issued, we see no conceptual difference between this situation and a contractual situation in which the aggrieved party does not discover the breach until subsequent to the merger. Surely a "claim existed" against the breaching party prior to merger and **surely a claim exists here.** The same analogy can be drawn to tort cases as well. **A claim in the broad sense exists, at least as to potential tax liability, without regard to whether the respondent [the Service] has officially claimed it against the taxpayer.**

Brannon's of Shawnee, Inc. v. Commissioner, 71 T.C. 108, 115-16 (1978) (interpreting "claims existing" as used in an Oklahoma statute)(citations omitted; emphasis added).<sup>8</sup>

Brannon's of Shawnee found that the Oklahoma merger statute was modeled on the Illinois merger statute, and opined on the intent and purpose of the Illinois legislature in extending the law to claims existing at the time of the merger as follows:

**The Illinois statute had been amended in 1933 to permit "claims existing" in addition to "actions or proceeding pending" to provide a basis for litigation in the name of the merged corporation. This amendment, we think, evinces a legislative effort to expand the number**

<sup>8</sup> In Brannon's of Shawnee the ultimate issue was whether the Tax Court lacked jurisdiction because the merged corporation filed the petition, thus lacked capacity to petition the court. The resolution of the capacity issue turned on whether the deficiency was within the phrase "claims existing" or there was a pending action before the merger. While the audit giving rise to the asserted deficiency in Brannon's of Shawnee had been initiated prior to the merger, the Tax Court discussion evidences the commencement of the audit was not necessary to be an existing claim, as the language quoted above evidences.

**of situations in which a merged corporation may sue or be sued.**

Brannon's of Shawnee, 71 T.C. at 117 (emphasis added).

Brannon's of Shawnee distinguished Paramount Warrior, Inc. v. Commissioner, T.C. Memo. 1976-400, *aff'd without published opinion*, 608 F.2d 522 (5th Cir. 1979),<sup>9</sup> which involved a merger under Nevada law, stating:

[i]n holding the consents invalid, this court grounded its opinion [in Paramount Warrior, Inc.,] on its finding under Nevada law that the merged corporation had no continued validity for purposes of litigation after the merger because "no action or proceeding" was pending at the time of the merger. **No provision in Nevada's merger statutes provided for continued viability, however, on the basis of "claim existing."**

Brannon's of Shawnee, 71 T.C. at 117 (emphasis added).

Illinois courts interpret the language relative to claims existing in the Illinois merger statute broadly as did Brannon's of Shawnee. For example, in Lawrence v. Williamson Ford, Inc., 300 N.E. 2d 636 (Ill. 1973), suit was brought against a merged corporation for personal injuries sustained nineteen years earlier when the plaintiff was a minor. The surviving corporation of the merger was misidentified and the defendant (actual successor) sought to have the case dismissed because it was served after the statute ran, albeit the complaint was filed before the statute ran when the minor became of age. The court interpreted § 69(e) of the Business Corporation Act (Ill. Rev. Stat. 1971, ch. 32, par. 157.69(e)),<sup>10</sup> which had the same text as in 805 ILL COMP. STAT. 5/11.50(a)(5). The court declined to dismiss the suit because the statute allowed the merged corporation to be sued in the merged corporation's name even after the merger, and permitted the successor corporation to be substituted later. The court stated "a plaintiff has the choice of describing the defendant by its old or its new corporate name in commencing suit against it," with qualifier "so long as the claim upon which suit is based existed against the merged corporation before the merger." Lawrence, 300 N.E. 2d at 640.

Lawrence specifically emphasized the breadth and scope of the Illinois merger law when it rejected a Federal district court decision that erroneously tried to limit the Illinois merger statute, which became 805 ILL COMP. STAT. 5/11.50, as follows:

---

<sup>9</sup> While not precedent, IRS CCA 200204001, 2002 WL 93292 (IRS CCA) states that Counsel does not view Paramount Warrior as controlling precedent in light of the later decided Woods v. Commissioner, 92 T.C. 776 (1989), with Woods discussed below, Law and Analysis, but in § 4, Reliance on the Year 6 Consent, rather than this § 1.B Illinois and State B Law Re: Merged Corporations.

<sup>10</sup> See Lawrence, 300 N.E. 2d at 639, n. 2 (quoting § 69(e) in its entirety).

Although not cited by either party, we would add that we reject the approach taken in the case of J.W.T.Inc. v. Joseph E. Seagram & Sons, Inc. (N.D.Ill. 1972), 347 F.Supp. 965, which dismissed a suit commenced against a corporation in its premerger name because the merger had taken place over two years earlier. While perhaps reaching a practical result, the court **erroneously applied** the two year limitation [now a five year limitation] of section 94 of the Business Corporation Act (Ill. Rev. Stat. 1971, ch. 32, par. 157.94), **pertaining to dissolutions**, to section 69(b) (Ill. Rev. Stat. 1971, ch. 32, par. 157.69(b)), providing that the separate existence of all pre-merger corporations except the survivor, shall cease. **In doing so the court not only overlooked the fact that section 94 pertains only to situations involving a winding up of the business in which no successor is contemplated, but also ignored the language of section 69(e) and the Herzog case which allow suit against the original corporation as if the merger had not taken place.**

Lawrence, 300 N.E. 2d at 641.

The Lawrence court stated with respect to the belated service of the successor corporation that "[p]ossibly the problem of giving notice to a nonexistent corporation was overlooked in the statute when it was amended in 1933." Lawrence, 300 N.E. 2d at 641, n. 3. The Court then solved the notice problem by looking to state law that allowed dismissal for failure to exercise reasonable diligence to serve when the statute expired after filing the complaint but prior to service. The appellate court then reversed the lower court dismissal in Lawrence and the case was remanded to ascertain if the plaintiff exercised the reasonable diligence necessary if service occurs after the statute runs when the suit was filed before it ran.

In a prior Illinois case, a school district and contractor agreed the contractor would reimburse the school district a portion of the costs after the school under construction was built, but the contractor merged with another corporation prior to payment. The school district sued the merged corporation for non-payment. The merged corporation moved to dismiss asserting the school district could not sue it post-merger since the claim had not been reduced to judgment. Relying on the predecessor statute to 805 ILL COMP. STAT. 5/11.50(a)(5), which is identical in wording, the court stated:

**[I]t would be a travesty on justice and pervert the intent of the statute if a corporation could rid itself of its obligation by merging with another corporation just before suit was filed against the absorbed corporation.**

Board of Education of Community School District No. 59 of Cook County v. Herzog



Building Corporation, 190 N.E.2d 152, 154 (IL 1963) (emphasis added) ("Herzog").

The court also opined

Under the present statute plaintiff had the choice of describing defendant by either its old or its new name; **in fact the proceeding is actually against the surviving corporation regardless of the name under which defendant is sued.**

Id. (emphasis added).

at 259-60.

. Oklahoma Natural Gas Co., 273 U.S.

The forum state's conflict of law rules are applicable to determine which state's substantive law applies. Knoll Pharmaceuticals Co. 152 F. Supp. 2d 1026, 1032 (N.D. IL 2001). In that case, the court found that since "suit was filed in Illinois, Illinois' choice of law rules will govern." 152 F. Supp. 2d at 1032. When there is not an applicable express choice of law clause for determining the issue (as here for the continued corporate-existence issue), Illinois law considers factors such as the location and domicile of the parties, where the contract was executed, place of performance, where the corporate entities were licensed to do business and other nexus-like factors. Knoll Pharmaceuticals Co. 152 F. Supp. 2d 1026, 1033-34.

In a situation where an Illinois corporation had merged into a Delaware Corporation, the court applied Illinois merger law, not Delaware law. Lawrence, 300 N.E. 2d at 638. Here we have the

. So Illinois law would be the applicable law. Looking to the modern approach to choice of law questions confirms that Illinois law should be applied.<sup>11</sup> Applying Illinois law,

---

<sup>11</sup> When the resolution of an issue turns on which state's law applies, a choice of law question is present.

The modern approach to choice-of-law questions places the greatest importance on the forum's public policy. The public policy of a state, for purposes of making a choice of law analysis, may be sought in its Constitution, legislative enactments, and judicial decisions. . . . Under Restatement (Second) of Conflict of Laws, when two or more jurisdictions have an interest in applying their law to a case, relevant factors in choosing which rule of law to apply are:

Since  
71 T.C. at 115) and Illinois law provides that  
(71 T.C. at 117),

(Brannon's of Shawnee,

805 ILCS 5/11.50(5). Cf.  
Asbury v. Commissioner, T.C. Memo. 2007-53, at \*5-\*6 (allowing officer of a dissolved  
corporation to file a petition and commence suit in reliance on Florida dissolution law on  
wind-up powers).

Thus, POA

Y could be captioned in, and executed in, Corporation A's name.

- 
- the needs of the interstate and international systems
  - the relevant policies of the forum
  - the relevant policies of the other interested states and the relative interests of those states in the determinations of the particular issues
  - the protection of justified expectations
  - the basic policies underlying the particular field of law
  - certainty, predictability, and uniformity of result
  - ease in the determination and application of the law to be applied.

Under the Restatement (Second) of Conflict of Laws, a court employs an interest-analysis approach in determining each factor's degree of significance for choice-of-law purposes. This approach is based on the conclusion that contacts obtain significance only to the extent that they relate to the policies and purposes sought to be vindicated by the conflicting laws, and instead of a mere counting of such contacts, what is required is a consideration of the interests and public policies of the potentially concerned statutes, and regard as to the manner and extent of such policies as they relate to the transaction in issue.

Eric C. Surette, Illinois Law and Practice, Conflict of Laws, Volume 11, § 2, Choice of Law Analysis, pp. 174-75.

Considering the Illinois legislative intent as stated in Brannon's of Shawnee, Inc., 71 T.C. at 117, the express language of the Illinois statute,

See Herzog 190 N.E. 2d 152 at 154 (Ill. 1963) (even when sued in the name of the merged corporation, the successor is liable).

Malone & Hyde, Inc., v. Commissioner, T.C. Memo 1992-661, 1992 Tax Ct. Memo. LEXIS 703, at \*22-\*23, rejected the continuing validity of a pre-merger power of attorney under Delaware law<sup>12</sup> (as opposed to a post-merger power of attorney).

Malone & Hyde is also distinguishable because it was applying Delaware law, not Illinois law. In addition, when Malone & Hyde applied § 259 of the Delaware statute in reliance on the parties' stipulation that Delaware law applied,<sup>13</sup> the Court specifically stated "it is difficult to understand how the Delaware statute could come into play . . . ." 1992 Tax Ct. Memo. LEXIS 703, at \*23. Furthermore, Malone & Hyde noted that "[t]he comparable Tennessee statutes contain the phrase "existing claim" which, if it were applicable, might bring this case within the ambit of Brannon's of Shawnee, Inc. v. Commissioner, 71 T.C. 108 (1978). 1992 Tax Ct. Memo. LEXIS 703, at \*29, n. 8 (other citations omitted).

In Lone Star Life Insurance Co. v. Commissioner, T.C. Memo. 1997-465, where the Court addressed the issue of whether the statute of limitations had expired when the consent to extend the statute had been executed pursuant to a power of attorney, the Court rejected the taxpayer's reliance on Malone & Hyde. The taxpayer in Lone Star Life Insurance Co. alleged the power of attorney could not be relied upon because the Service had dealt directly with the subsidiary (the petitioner in the case) and that direct dealing had terminated the agency relationship between the parent and subsidiary based on Treas. Reg. §1.1502-77(a), thus rendering the power of attorney and the consents signed pursuant to the power of attorney invalid. The taxpayer further argued that neither intent nor ratification could create an agency power in the parent to bind the subsidiary, citing Malone & Hyde.

Lone Star Life Insurance Company opined that the fatal flaw in the taxpayer's argument was the assumption that the parent lacked the legal capacity. Because Treas. Reg. § 1.1502-77(a) did not actually terminate the parent's authority to act as agent for its subsidiary (it allowed the subsidiary to act on its own in certain circumstances) the

---

<sup>12</sup> Malone & Hyde, Inc. found that the usual rule that a power of attorney terminates upon death is not altered for a corporation that went out of existence by merger based on Delaware corporate law.

<sup>13</sup> Section 259 of the Delaware merger statute (DEL. CODE tit. 8, § 1 ) provides that a surviving company possesses "all the rights, privileges, powers and franchises as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties" as being limited to substantive matters, such as collective bargaining agreements, not powers of attorneys. While the Illinois merger law has similar language, that language was being applied in Malone & Hyde to determine if a pre-merger power of attorney survived, not to determine if a merged corporation continued to exist for purposes of being sued or bringing suit relative to pre-merger existing claims.

agency was not terminated. Thus, the Court relied upon theories of mutual assent and ratification to validate the consent based on the close nexus between the parent and the subsidiary, such as the common corporate officers, use of the same address and the intent to extend the statutes

citing to cases holding petitions could be ratified after filing. Here, since Illinois law did not terminate Corporation A's authority to sue and be sued

(just as in Lone Star Life Insurance Co. the regulation did not terminate the parent's authority), the power of attorney can be relied upon to extend the statute of limitations since the nexus between Corporation A and Corporation B is just as close, if not closer, than the nexus in Lone Star Life Insurance Co.

### C. Conclusion Re: State Law

Based on the Illinois merger statute and cases addressed above, which provide that a  
and

applying choice of law principles, Officer One, as prior president of Corporation A and current president of Corporation A's Successor, *i.e.* Corporation B, had the authority under Illinois law to extend the statute of limitations for Corporation A's Year 3 Tax Return in the name of Corporation A, signing as Corporation A's President.

Accordingly, the Service can rely upon POA Y captioned in the name of Corporation A and signed by Officer One as Corporation A's President after the Year 4 merger of Corporation A into Corporation B. See Lefebvre v. Commissioner, T.C. Memo. 1984-202, 1984 Tax Ct. Memo. LEXIS 475, at \*13, aff'd 758 F.2d 1340 (9th Cir. 1985) (validating a consent signed pursuant to a power of attorney that the taxpayer alleged to be defective, relying on case law that rejected placing the government in a strait-jacket and found that I.R.C. § 276(b) [predecessor to, and identical to § 6501(c)(4)] regulations are advisory.)

## 2. **Agency Law Re: Powers of Attorney**

Assuming, *arguendo*, that Illinois law does not authorize Corporation A to execute POA Y in its own name with the signature of Corporation B's current president as Corporation A's president, Corporation B is still bound by the consent under common law agency principles. See Asbury v. Commissioner, T.C. Memo 2007-53, 2007 Tax Ct. Memo. LEXIS 53, at \*14 ("Questions about the authority of an officer of a corporation to act for and to bind the corporation are questions of fact to be decided under the common law of agency.") (citation omitted); Lone Star Life Insurance Company v. Commissioner, T.C. Memo. 1997-465 (agency and ratification principles applied in upholding a consent signed pursuant to a power of attorney).

Generally, "[i]n order to bind the principal, the agent must either have actual or apparent authority, or the principal must ratify the agent's acts." Trans World Travel v. Commissioner, T.C. Memo 2001-6, 2001 Tax Ct. Memo. LEXIS 7, at \*20.

Actual agency or actual authority is defined as the authority which a principal expressly or implicitly grants to an agent. Apparent agency or apparent authority "arises when the principal creates by its words or conduct the reasonable impression in a third party that the agent has authority to act." If apparent agency or apparent authority is established, and it is shown that a third party relying on the apparent authority did so rely in good faith and was justified in so relying, the principal is bound to the same extent as with actual authority.

Alumax v. Commissioner, 109 T.C. 133, at 197 (1997) aff'd 165 F.3d 822 (11th Cir. 1999) (citations omitted).

A. Apparent Authority

Apparent agency authority exists when "**a third party reasonably believes** the actor has authority to act on behalf of the principal **and that belief is traceable to the principal's manifestations.**" Restatement (Third) of Agency, § 2.03 (2006) (emphasis added).



As to the reasonableness of the Service's reliance on these repeated manifestations of authority from the principal (Corporation B), the facts, as a whole, establish the Service's reliance was reasonable even though the Service knew that Corporation A had merged into Corporation

These extenuating facts evidencing Representative One's authority to act for, and bind, Corporation B after the merger, based on manifestations of the principal, make it reasonable for the revenue agent to rely upon Representative One as the apparent agent that could act for, and bind, Corporation B relative to Corporation A's Year 3 and Year 4 Tax Returns notwithstanding the revenue agent's actual knowledge of the merger. The revenue agent's reliance was a good faith reliance, and was justified, given Corporation B's pattern of actions representing Corporation A had authority to act in its own name. This case does not present the question of whether there was a termination of a power; the manifestations of authority listed above were all after the



merger of Corporation A into Corporation B.

Accordingly, the Service can rely upon POA Y since Representative One had apparent authority to perform the acts set forth in POA Y and the revenue agent's belief that Representative One had such authority was reasonable

Cf. Lefebvre v. Commissioner, T.C.

Memo. 1984-202 (1984) aff'd 758 F.2d 1340 (9th Cir. 1985) (estopping a taxpayer from denying the authority of a representative named in a power of attorney to execute a consent on the taxpayer's behalf when the taxpayer signed the power of attorney form and submitted the form to the representative to deliver to the Service, where the taxpayer set in motion the sequence of events that led to the Service's reliance on the power of attorney form); Alumax v. Commissioner, 109 T.C. 133 (1997) aff'd 165 F.3d 822 (11th Cir. 1999) (applying an agent of an agent theory to validate a consent).

#### B. Ratification

Assuming, *arguendo*, that Illinois law did not allow Corporation A to sign POA Y in its own name and assuming, *arguendo*, that the Service's knowledge of the merger negates the reasonableness of the Service's belief so there is no apparent authority, Corporation B is nevertheless bound by POA Y based on ratification. See Lone Star Life Insurance Company v. Commissioner, T.C. Memo. 1997-465 (agency and ratification principles applied in upholding a consent signed pursuant to a power of attorney).

It is clear that Illinois law allows ratification of an agent's acts, especially where the ratification protects a creditor. See 805 ILL COMP. STAT. 5/11.50(a)(5), last sentence (evidencing legislative intent to protect creditors of merged corporations). When deciding whether a corporation had ratified a petition filed by an accountant, the Tax Court summarized Illinois law relative to ratification, citing multiple Illinois cases as support of allowing ratification, as follows:

A finding of ratification under Illinois agency law is a complex, fact-intensive inquiry. A wholly unauthorized act may nevertheless be made valid by a subsequent ratification, in that such subsequent assent would confirm what was originally an unauthorized and illegal act. As applicable herein, ratification means retroactive adoption of an unauthorized signature by the person whose name is signed.

Ratification may be found from express statements or it may be inferred from the surrounding circumstances, for example, where the principal takes a position inconsistent with nonaffirmation of the transaction, or fails to repudiate the agent's acts, or retains the benefits of the unauthorized transaction. In contrast, ratification will not be implied from acts or conduct that clearly evidences an intent not to ratify.

Trans World Travel, T.C. Memo 2001-6, 2001 Tax Ct. memo. LEXIS 7, at \*30 (citations omitted).

In Trans World Travel, the Tax Court found ratification of a pending Tax Court proceeding under Illinois law because the taxpayer knew or should have known that a petition had been filed in its name.

Thus, while the primary position is that POA Y signed by Officer One is valid (see § 1.B., above), with the alternative position that Representative One had apparent authority to perform the acts set forth in POA Y (see § 2.A., above), if a court were to disagree with these positions, then POA Y was "made valid by the subsequent ratification, in that such subsequent assent would confirm what was originally an unauthorized and illegal act." Trans World Travel, T.C. Memo 2001-6, 2001 Tax Ct. Memo. LEXIS 7, at \*30 (citations omitted). The ratification constitutes a "retroactive adoption of an unauthorized signature by the person whose name is signed." Id.

### **3. Equitable Estoppel Re: Power of Attorney**

"Equitable estoppel is a judicial doctrine that precludes a party from denying that party's own acts or representations that induce another to act to his or her detriment." McCorkle v. Commissioner, 124 T.C. 56, 68 (2005). Union Texas International Corporation v. Commissioner, 110 T.C. 321, 327 (1998) lists four elements that must be established for equitable estoppel:

1. "There must be a false representation or wrongful misleading silence by the party against whom the estoppel is claimed;
2. "[T]he error must originate in a statement of fact, not in opinion or a statement of law;
3. "[T]he party claiming the benefits of the estoppel must have actually and reasonably relied on the acts or statement of the party against whom the estoppel is claimed, and as a consequence of that reliance must be adversely affected by the acts or statements of the one against whom an estoppel is claimed; and

4. "[T]he party claiming the benefits of estoppel must not know the true facts.

110 T.C. at 327.

The fourth element of equitable estoppel, as applied in Union Texas International Corporation, goes beyond the requirement of reasonableness in agency common law. Union Texas International Corporation, in construing what was required for the fourth element to be met for the purposes of equitable estoppel, relied on a Supreme Court case that opined on the application of estoppel to determine title to real estate in the context of depriving the heirs of their father's property. The Supreme Court in rejecting applying equitable estoppel stated

[i]t is also essential for [equitable estoppel] application with respect to the title of real property that **the party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge.**

Brant v. Virginia Coal and Iron Co., 93 U.S. 326, 337 (1876), cited with approval and quoted in part in Union Texas International Corporation, 110 T.C. at 331.

In essence, pursuant to Union Texas International Corporation reliance on the strict standard announced for real estate title, for the Service to prevail in estopping a taxpayer from repudiating a consent that was signed without actual or apparent authority, the Service must affirmatively establish that its audit team did not know, and could not readily find out, that a taxpayer merged out of existence. Or as stated by the Supreme Court, the Service must prove it was "destitute of knowledge" that Corporation B was the successor and could not find out. See Union Texas International Corporation, 110 T.C. at 331-338 (discussion of the facts needed for the Tax Court to conclude the audit team lacked actual knowledge of the merger and, as auditors of windfall profits taxes reported on Forms 720, excise tax returns, could not readily obtain such knowledge). Accord, Reifler v. Commissioner, T.C. Memo. 2013-258; Hunter v. Commissioner, T.C. Memo. 2004-81.

Therefore, assuming, *arguendo*, that Illinois law did not authorize Corporation A to continue in existence for purposes of being sued or bringing suit with respect to Corporation A's Year 3 tax liability so that Corporation A lacked actual authority to act in its own name,<sup>14</sup> and assuming, *arguendo*, that neither apparent authority nor ratification

---

<sup>14</sup> See § 1, State Law, above (actual authority does exist under Illinois law for Corporation A). The corporations involved in the transactions in Union Texas International Corporation were all Delaware corporations, with Delaware law on the survival of the merged corporation more limited than Illinois law, which allows survival for "claims existing", as discussed in Law and Analysis, § 1, State Law, above.

apply,<sup>15</sup> the fourth element in Union Texas International Corporation, which the Service must prove to stop Corporation B from repudiating the Form 2848, cannot be met. The Service did know that Corporation A merged into Corporation B at the end of Year 4. Thus, although the first,<sup>16</sup> second<sup>17</sup> and third<sup>18</sup> elements of equitable estoppel are met in this case, the higher threshold required for equitable estoppel in the fourth element, which is not required for agency to exist,<sup>19</sup> precludes the Service from asserting equitable estoppel because the Service knew of the merger.

#### 4. Reliance on Consent One

Given POA X can be relied upon by the Service as discussed in Law and Analysis §§ 1 and 2 (state law and agency law, respectively), above, the next question is whether Consent One can be relied upon by the Service. While, at first blush, Consent One appears to constitute an agreement to extend the statute of limitations for the Year 4 Tax Return until Date AE, Year 8 that is within § 6501(c)(4), on its face,

Yet, it is clear from the facts that the parties did intend to extend the statute of limitations for Corporation A's Year 3 Tax Return and made a mutual mistake in captioning and signing in Corporation A's name.

For contracts, where the parties make a mutual mistake, the contract can be conformed to the intent of the parties using reformation. See 76 C.J.S. Reformation of Instruments § 1 (2014) ("Reformation is an equitable remedy by which an instrument may be corrected when a mistake is discovered so as to reflect the real intention of the

---

<sup>15</sup> See Law and Analysis, § 2, Agency Law Re: Powers of Attorney, above (apparent authority does exist in this case, with the authority of Representative One ratified so authority exists even if there was no apparent authority).

<sup>16</sup> For the first element (keeping in mind that neither Corporation B's representations nor Corporation B's silence can be false or wrongful if, under Illinois law, Corporation A can continue to act), each and every manifestation of agency in the agency section can be considered wrongful and Corporation A's silences misleading if Corporation A could no longer sign agreements or a power of attorney in its own name. Hence, element one can be established by the Service.

<sup>17</sup> For the second element, it could be argued the representations of Corporation B were based on a mistake of law; however, the manifestations and arguments relied upon in Law and Analysis, § 2, Agency Law Re: Powers of Attorney, above, are purely fact-based. This type of fact versus law distinction was sanctioned in Union Texas International Corp., 110 T.C. at 330. Hence, element two can be established by the Service.

<sup>18</sup>

<sup>19</sup> See Law and Analysis, § 2, Agency Law Re: Powers of Attorney, above (apparent authority does exist in this case).

parties."); 27 Samuel Williston, A Treatise on the Law of Contracts § 70:33 (4th ed. 2014) ("Reformation of a contract will be permitted for a material, mutual mistake.").

Although a Form 872 is not a contract, since it is a unilateral document wherein the taxpayer signs to extend the time to assess, contract principles are relevant because §6501(c)(4) requires that the parties reach a "written agreement" concerning any extension. See Piarulle v. Commissioner, 80 T.C. 1035, 1042 (1983)

(A consent to extend the period for assessment of an income tax is essentially a unilateral waiver of a defense by the taxpayer and is not a contract. Contract principles are significant, however, because section 6501(c)(4) requires that the parties reach a written agreement as to the extension. The term "agreement" means a manifestation of mutual assent.").

80 T.C. at 1042 (citations omitted).

See also Kronish v. Commissioner, 90 T.C. 684, 693 (1988) (essentially same language as in Piarulle).

The Tax Court has the equitable power to reform a consent to conform to the parties' intention, as established in Woods v. Commissioner, 92 T.C. 776 (1989), wherein a consent was reformed based on the intent of the parties. In Woods, which was an opinion reviewed by the full Tax Court, the Tax Court rejected older cases that did not confirm the Tax Court had equitable powers and could reform consents.

However, in order to reform a consent, there must be clear and convincing evidence the parties intended to extend the statute of limitations. Woods. Based on the facts and the law and analysis in the foregoing sections of this memorandum, there is clear and convincing evidence that Representative One had authority to bind Corporation B, as well as clear and convincing evidence that both Corporation B and the Service intended that Consent One extend the statute of limitations for Corporation A's Year 3 Tax Return. See, e.g., POA Y, POA Z, Consent Two, and the Year 8 Form 977.

Consent One, as captioned and with the corporate name of Corporation A in the section below Representative One's signature, did not reflect the shared intent of Corporation B and the Service to extend the statute of limitations. To reflect the intent of Corporation B and the Service, the Consent One should have been captioned as follows:

.\*

The asterisk should have indicated:

\*

Thus, the address, year, type of taxes and Representative One being the signer of the consent need not change. See Consent Two (executed with the correct caption, but after Corporation B changed its address so with a State A address). See also Rev. Rul. 59-399, 1959-2 C.B. 488 (holding that the surviving or resulting corporation in a merger or consolidation under state law may validly sign an extension agreement on behalf of the predecessor corporation for a period before the transfer).

Even if the errors in drafting Consent One cannot be considered just clerical errors, typographical errors, or scrivener's errors of the type involved in Woods,<sup>20</sup> based on the facts of this case and the facts in the Woods case, it is likely that the Tax Court would reform Consent One to conform to the parties' intentions because the principles of contract reformation are not limited to situations involving clerical-type errors. See St. Louis County National Bank v. Maryland Casualty Co., 564 S.W.2d 920, 924 (Mo. 1978) (citations omitted) (reformation is appropriate "whether it is a mistake of law or fact or merely a scrivener's error; all may be rectified in equity.")

Warner Collieries Co. v. United States, 63 F.2d 34 (6th Cir. 1933), provides additional support for reforming the Consent One. In that case, waivers of the statute of limitations were deemed valid, based on the parties' intent, even though improperly executed in the name of a corporation no longer in existence. See Mulford v. Commissioner, 66 F.2d 296 (3rd Cir. 1933) (year to which the waiver applied was omitted from the consent form, but consent was nonetheless held to be valid).

Accordingly, the Service may rely on Consent One

Counsel will defend the Service's reliance on Consent One should Corporation B claim the statute had expired for Corporation A's Year 3 Tax Return before Consent Two was signed.

## **5. Transferee Liability**

The only reason to obtain a Form 977, Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax Against a Transferee or Fiduciary,

---

<sup>20</sup> Woods involved a restricted consent limited to deductions flowing from a specific S corporation. The name and EIN of the S corporation was wrong on the consent, with the correct name and correct EIN inserted via reformation.

from Corporation B as a transferee for the Year 3 year tax liability of Corporation A is to protect against the possibility that Consent One cannot be relied upon by the Service. At the time that Counsel advised protectively securing a Form 977 from Corporation B as a transferee before the transferee statute expired, Counsel had not yet opined on whether Consent One could be relied upon and the transferee statute was about to expire.



As a result of the corporate merger, Corporation B, as the surviving corporation, effectively stepped into the shoes of Corporation A, the merged corporation. Since Corporation B is a transferee of Corporation A by virtue of the merger, Corporation B meets the definition of a transferee. See I.R.C. § 6901(h); Treas. Reg. § 301.6901-1(b).<sup>21</sup> Corporation B can be both a successor and a transferee at the same time for the same tax, and both the Form 977 and Consent One can extend the statute for the liability. See Rev. Rul. 59-300, 1959-2 C.B. 282 (opining that a Form 977, extending the transferee statute of limitations signed by the resultant corporation (successor) and that a Form 872 extending the statute on behalf of the absorbed constituent (merged corporation) signed by the resultant corporation (successor) both operate to extend the statute of limitations).

Section 6901(c) provides that the statute of limitations for assessment of any transferee liability shall generally expire one year after the expiration of the statute of limitations for assessment against the transferor.

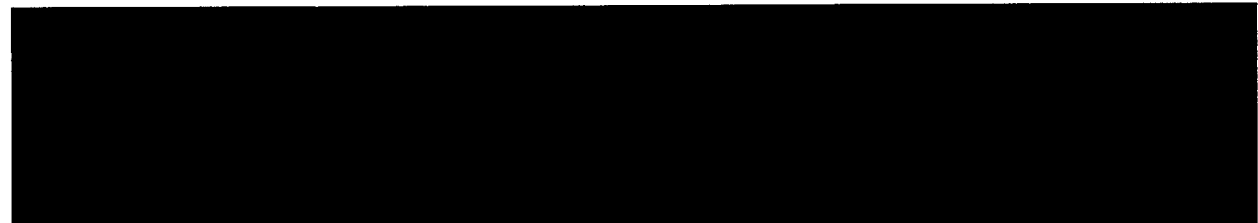
However, the statute of limitations on assessment with respect to the transferee may be extended if the Service and transferee consent in writing to extend the transferee liability statute prior to the expiration of the general transferee statute of limitations. I.R.C. § 6901(c)(1); Treas. Reg. § 301.6901-1(c)(1).

---

<sup>21</sup> Treas. Reg. § 301.6901-1(b) specifically states that "‘transferee’ includes . . . the successor of a corporation. . . ."



By extending the transferee statute within the extra year provided by § 6901(c)(1), even though the transferor's statute had expired, the transferee statute is extended. I.R.C. § 6901(d)(1); Treas. Reg. § 301.6901-1(d)(2).



See Lone Star Life Insurance Company, T.C. Memo. 1997-465, 1997 Tax Ct. Memo. LEXIS 553, at \*24-\*25 (In the context of a consolidated proceeding for two docketed cases where the Service protectively issued two notices, one to the common parent and one to the subsidiary that might not be part of the consolidated group, the court found that the notice in one docket was valid before dismissing the other docket on the grounds that the underlying notice was an impermissible second notice pursuant to I.R.C. § 6212(c)).



This advice was formally coordinated with the Office of the Assistance Chief Counsel, Procedure and Administration.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call 312-368-8730 if you have any further questions.

James. C. Cascino  
Associate Area Counsel  
(Large Business & International)

By: \_\_\_\_\_  
Marjory A. Gilbert  
Senior Counsel  
(Large Business & International)

cc:  
Supervisory Internal Revenue Agent,